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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

SUPREME BEEF PROCESSORS, INC.,

Petitioner,

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

WHETHER THE INTERSTATE COMMERCE COMMISSION, IN EXERCISING ITS PRIMARY JURISDICTION UNDER 49 USC § 10701(a) OVER THE LAWFULNESS OF MOTOR COMMON CARRIER PRACTICES IN ACCORDANCE WITH REGULATORY CHANGES AFTER THE MOTOR CARRIER ACT OF 1980, MAY DETERMINE THAT IT IS AN UNREASONABLE PRACTICE FOR A CARRIER TO (1) FALSELY REPRESENT TO A SHIPPER ON A CONTINUING BASIS THAT SPECIFIC RATES ARE LEGALLY EFFECTIVE, (2) ISSUE BILLINGS AND ACCEPT PAYMENTS BASED UPON SUCH REPRESENTATIONS, AND (3), AFTER CEASING OPERATIONS, SEEK TO COLLECT HIGHER CHARGES BASED UPON THE CARRIER'S OWN FAILURE TO FILE THE ORIGINALLY QUOTED RATES WITH THE COMMISSION.

II.

WHETHER A SHIPPER WHICH RAISES THE DEFENSE OF UNREASONABLE PRACTICES IN A MOTOR CARRIER ACTION TO COLLECT FREIGHT CHARGES IS REQUIRED TO PAY THE CHARGES TO THE CARRIER PRIOR TO CONSIDERATION OF ITS DEFENSE BY THE INTERSTATE COMMERCE COMMISSION.

III.

WHETHER THE STATUTORILY PROTECTED PUBLIC INTEREST IN SECURING LOWER RATE SCHEDULES FOR GOVERNMENT TRANSPORTATION REQUIRES ALLOWANCE OF A DELAYED ASSERTION OF THAT INTEREST IN PROCEEDINGS BEFORE UNITED STATES DISTRICT COURTS.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties in the proceeding before the United States Court of Appeals for the Fifth Circuit. Petitioner has no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case affirming a grant of summary judgment in Respondent's action to collect motor carrier freight charges from Petitioner and denying Petitioner's request that the case be referred to the Interstate Commerce Commission for a determination of whether collection of such charges would constitute an unreasonable practice prohibited by 49 USC § 10701(a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 864 F2d 388 and is reprinted as Appendix B.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas (Buchmeyer, D.J.) granting summary judgment for

Respondent has not been reported and is reprinted as Appendix D. Also unreported and attached as appendices are the District Court's subsequent Order Denying Reconsideration of summary judgment (Appendix C), its prior Memorandum Opinion and Order Denying Petitioner's motion for referral to the Interstate Commerce Commission (Appendix E), and an Order of the United States Bankruptcy Court for the Northern District of Texas (McGuire, B.J.) denying Petitioner's Motion to Transfer proceedings to the Interstate Commerce Commission. (Appendix F).

JURISDICTION

The opinion and judgment of the Fifth Circuit was entered on February 2, 1989. A timely petition for rehearing was denied on March 1, 1989. (Appendix A). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

49 USC § 10701 *Standards for Rates, Classifications, Through Routes, Rules, and Practices*

(a) A rate (other than a rail rate), classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable. * * *

STATEMENT OF THE CASE

This case originated upon the filing by Respondent of an adversary complaint in the United States Bankruptcy Court for the Northern District of Texas on August 29, 1985. The complaint sought to collect motor carrier freight charges in addition to those previously billed and paid on 218 motor carrier shipments transported between January 7, 1983, and March 30, 1984. Jurisdiction was invoked pursuant to 28 USC § 1334 (cases or proceedings arising under, arising in, or related to cases under Title 11, USC). Payment of the additional charges in question was alleged to be required by 49 USC § 10762, thus presenting a federal question within the meaning of 28 USC § 1331 (general federal question). Respondent filed the complaint in his capacity as trustee in bankruptcy for Caravan Refrigerated Cargo, Inc., which had performed the interstate motor common carrier service in question.

Petitioner filed an answer, affirmative defenses, and counterclaim on February 11, 1986, alleging, *inter alia*, that collection of the additional charges would constitute an unreasonable practice prohibited by 49 USC § 10701(a). (Answer and Counterclaim, ¶ 10). Petitioner stated that Caravan had induced Petitioner to use Caravan's services by representing that it could perform services for Petitioner at specified rates and charges. (Answer and Counterclaim, ¶ 8). Petitioner also stated that Caravan had followed a uniform practice of billing Petitioner at the level of charges quoted and agreed to, and of accepting payment from Petitioner based on such billings. (Answer and Counterclaim, ¶¶ 27, 28). Petitioner further stated that it received no indication from Caravan that the rates quoted and billed were not filed with the Interstate Commerce Commission

("ICC") until after Caravan had discontinued its operations. (Answer and Counterclaim, ¶¶ 29, 30).

On April 30, 1986, Petitioner filed a motion for a stay of proceedings in the Bankruptcy Court and consideration of its unreasonable practice defense by the ICC. Uncontroverted affidavits submitted in support of the motion by former officers of Caravan and by an officer of Petitioner demonstrated that (1) Caravan uniformly billed Petitioner at the negotiated level of rates, (2) Petitioner was told by Caravan personnel that all rates charged were lawfully in effect, (3) Petitioner paid all charges as billed, and (4) Caravan had raised no question as to the lawfulness of those charges until after its cessation of operations in bankruptcy. (Affidavits of J. Moore, S. Spiritas, and J. Newbold, April 30, 1986; May 1, 1986; and May 28, 1986). The affidavits also demonstrated that the rates charged by Caravan were not discriminatory, but rather, were similar to rates charged to Petitioner by other competing carriers. (Affidavit of J. Moore, April 30, 1986, p. 2). An affidavit of one of the former Caravan officers conceded that Caravan's practice of misrepresenting that lower rates were in effect was a part of a specific effort by Caravan to retain Petitioner's business in the face of competition from other carriers, even when Caravan was not able to make the rate filings alleged to be necessary to comply with ICC tariff filing requirements. (Affidavit of J. Newbold, pp. 2-3).

Petitioner's motion referred extensively to a then-pending proceeding before the ICC in which a major national transportation organization, The National Industrial Transportation League, had sought promulgation of a rule by the ICC declaring assessment of published rates to be unreasonable under circumstances similar to those alleged by Petitioner. *Ex Parte* No. MC-177, *National Industrial Transportation League* —

Petition To Initiate Rulemaking on Negotiated Motor Common Carrier Rates ("*Negotiated Rates*"). On May 8, 1986, the ICC announced that it intended to issue a policy statement in lieu of a formal rule concerning this issue. As a result of this announcement, Petitioner and Caravan agreed to suspend further proceedings before the Bankruptcy Court until the ICC issued a written decision setting forth its conclusions.

On October 29, 1986, the ICC's written decision in *Negotiated Rates* issued at 3 ICC 2d 99. The ICC stated that Congress in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, had amended the National Transportation Policy to require the ICC to promote competitive, innovative, and individualized price and service options to meet changing market demand. Pub. L. No. 96-296 § 4; 49 USC § 10101(a)(7); *Negotiated Rates, supra,* at 3 ICC 2d 105. The ICC noted that passage of the Motor Carrier Act had resulted in such changes as eliminating prohibitions against rates applicable to only one shipper, allowing common carrier rates to be filed on short notice, and permitting common carriers to perform service as contract carriers as well. *Id.* at 105, 106.

Under these circumstances, the ICC stated that shippers and carriers were called upon to negotiate hundreds or even thousands of individual motor common carrier rates daily. *Id.* at 105. Such increased competitive activity made it extremely difficult for shippers to determine prior to movement whether agreed rates were actually on file. It also placed greater importance on the accuracy of carriers' representations concerning their rate levels. *Id.* at 105, 106.

Because of these circumstances, the ICC stated that, under appropriate circumstances, it would find that carrier attempts to collect their published charges

would be found to constitute unreasonable practices in violation of 49 USC § 10701(a) where the carrier had negotiated a lower rate with the shipper and had indicated that the negotiated rate would be the one charged and filed as a tariff. *Id.* at 107. The ICC further indicated that it would exercise its unreasonable practice jurisdiction upon referral from courts in which carrier actions to collect charges were pending. *Id.* at 106-7.

On July 11, 1987, the Bankruptcy Court issued an order denying Petitioner's motion for referral. (Appendix F). Simultaneously, however, the Bankruptcy Court recommended transfer of the entire proceeding to the United States District Court. Petitioner reasserted its motion for referral before the District Court. That motion, however, was denied by the District Court on November 13, 1987. (Appendix E). The District Court held that referral of reasonableness issues was not mandatory and that it felt qualified to render a decision without a prior ICC determination. Petitioner and Respondent then filed cross-motions for summary judgment, with Respondent also seeking dismissal of Petitioner's counterclaim. The District Court on January 20, 1988, granted Respondent's motion for summary judgment as to all issues. (Appendix D).

On January 28, 1988, Petitioner moved for reconsideration of the District Court's order. In part, Petitioner sought reconsideration based on the fact that a number of the underlying shipments were performed on behalf of government agencies.[1] Under 49 USC § 10721(b)(1), such shipments are exempt from rate filing requirements so as to be exempt from any tariff collection

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[1] Approximately fifty percent of the shipments at issue fall into this category. Petitioner paid the freight charges on these shipments and passed the charges through to the government without change.

obligations under 49 USC § 10761. *Jetco, Inc.* v. *U.S.*, 11 Cl. Ct. 837 (1987). The District Court denied the motion for reconsideration. (Appendix C). Petitioner then filed its appeal to the United States Court of Appeals for the Fifth Circuit. Following briefing and argument, the Fifth Circuit issued its decision affirming summary judgment on February 2, 1989. (Appendix B).

In affirming the District Court, the Fifth Circuit's apparent conclusion was that carrier practices of the type both alleged by Petitioner on the record below and described by the ICC in *Negotiated Rates* cannot constitute a defense to a motor carrier action to collect published freight charges. The Court stated that allowing such a defense to be asserted and referred to the ICC for decision would create an exception to the requirement of 49 USC § 10761 that carriers must collect their filed tariff charges. (B-9). The Court distinguished the instant case from the opinion of the Eleventh Circuit in *Seaboard System R.R.* v. *United States*, 794 F2d 635 (11th Cir. 1986). While conceding that *Seaboard* had upheld an ICC ruling finding that a carrier had engaged in an unreasonable practice by misquoting rates to a shipper, the Fifth Circuit stated that this defense was available only where the carrier's misquotation involved an unclear or ambiguous tariff. (B-11). The Fifth Circuit also stated that affirmance of the District Court was required by its decision in *Southern Pacific Transp. Co.* v. *City of San Antonio*, 748 F2d 266 (5th Cir. 1984). It stated that *Southern Pacific* held that a carrier is entitled to seek payment of charges in its tariff in Court even while the reasonableness of those tariffs is challenged before the ICC (B-8) and that such a holding required rejection of Petitioner's unreasonable practice defense. (B-9).

The Fifth Circuit also rejected Petitioner's contention that application of published tariffs was not required on its shipments for the government. It did not address the District Court's ruling on the merits of this contention. Rather, it held that Petitioner should have been barred from raising this argument before the District Court on reconsideration because it had not raised the argument prior to summary judgment. (B-13). A timely-filed petition for rehearing was denied by the Fifth Circuit on March 1, 1989.

REASONS FOR GRANTING THE WRIT

This case presents the Court with issues which are the focus of litigation in literally hundreds of pending federal and state court proceedings involving shippers using the nation's interstate motor common carrier system. As a by-product of increased competitiveness in this system fostered by Congress in the Motor Carrier Act of 1980, shippers have been faced with an increasing pattern of willful understatement by motor common carriers of their legally effective charges. These misstatements have been buttressed by lengthy periods of billing and acceptance of payment by carriers at these understated levels. At a later date, almost always after the carrier has ceased operations, a collection agency purporting to act for the carrier or its bankruptcy trustee brings an action to collect "undercharges." This action is based upon the higher rates which had remained legally in effect because of the carrier's failure to file the lower rates which it had promised the shippers.

Decisions of this Court and the Courts of Appeal have long upheld the power of the ICC to declare inequitable, deceptive, or unwarranted carrier rate practices unreasonable under 49 USC § 10701(a). The ICC's *Negotiated Rates* policy statement specifically declared

the intention of the ICC to expand its use of these powers to address rate misrepresentation issues. The opinion of the Fifth Circuit, however, along with decisions of a minority of lower courts, holds that shippers are foreclosed from asserting unreasonableness of such practices as a defense to carrier collection actions.

The Fifth Circuit decision is in direct conflict with the decision of the Eleventh Circuit in *Seaboard System R.R.* v. *United States, supra,* 794 F2d 635. *Seaboard* affirms a decision of the ICC holding that it would be an unreasonable practice for a carrier to collect its published tariff rates where it had misled the shipper as to the applicable tariff rate. *Id.* at 637, 639. The decision is also in direct conflict with the decisions of this Court in *United States* v. *Western Pacific R. Co.,* 352 U.S. 59 (1956) and the Seventh Circuit in *Western Transportation Co.* v. *Wilson & Co.,* 682 F2d 1227 (7th Cir. 1982). Those decisions hold that a shipper may raise unreasonableness as a defense to a carrier collection action without first paying the charges at issue to the carrier.

The decisional conflict before the Court, however, relates not only to the conflict between these cases and the Fifth Circuit opinion below, but also to the conflict extant in the myriad of currently pending cases on this issue. As indicated by the abstract of cases contained in Appendices G & H, litigation involving these same issues currently is pending on appeal in five other circuits.[2] Federal or state courts have granted referral of approximately 150 proceedings involving these issues to

[2] *Appco Paper & Plastic Co.* v. *Oneida Trucking Co.,* No. 88-9057 (2d Cir.) (appeal from decision denying reference to ICC); *Orr* v. *ICC,* No. 89-5108 (6th Cir.) (appeal from the decision affirming unreasonableness finding of ICC); *Zenith Electronics Corp.* v. *Orscheln Brothers Truck Lines,* Nos. 89-1261, 1329, 1330 (7th Cir.) (appeal from decision declining to apply ICC unreasonableness finding); *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.,* No. 88-2267-WM (8th Cir.) (appeal from decision affirming unreasonableness finding of ICC); *Delta Traffic Service* v. *Marine Lumber Co.,* No. 89-35121 (9th Cir.) (appeal from decision affirming unreasonableness finding of ICC).

the ICC for determinations as to the unreasonableness of motor carrier practices under 49 USC § 10701(a). (G-1 – G-9). In approximately 50 cases, however, district courts, bankruptcy courts, or state courts have denied shipper requests for referral of unreasonable practice defenses to the ICC. (H-1 – H-5). In additional cases, district or bankruptcy courts have rejected ICC findings of unreasonable motor carrier practices as non-binding. (H-1 – H-5). The conflict among these decisions is one which only this Court can resolve.

I.

THE ICC HAS DISCRETION TO DETERMINE THAT THE CARRIER CONDUCT ALLEGED IN THIS CASE CONSTITUTES AN UNREASONABLE PRACTICE PROHIBITED BY 49 USC § 10701(a).

The fundamental issue for decision by the Court is whether the long-exercised statutory power of the ICC to declare motor carrier rates or their collection unreasonable may be negated by an over-extension of the statutory requirement that carriers initially charge their published rates. The policy announced by the ICC in *Negotiated Rates* and applied in many succeeding cases is an exercise of the long-established statutory powers of the ICC, currently codified at 49 USC § 10701(a), to declare that collection of rates in carrier tariffs may constitute unreasonable practices under appropriate circumstances. Such findings require that related court actions for collection must be dismissed.

Decisions such as that of the Fifth Circuit below ignore this important statutory function of the ICC. Rather, they extend case precedents which bar *courts* from considering misrepresentation, fraud, or prior agreement as defenses to the collection of published charges to bar *the ICC* from considering such factors in

the exercise of its congressionally mandated powers under 49 USC § 10701(a). Such a theory represents a perverse statutory construction which this Court should not countenance. In the words of the Eleventh Circuit, prior to the inception of the present controversy, "the courts [had] never held that the ICC lacks authority to prohibit the unreasonable collection of undercharges." *Seaboard System R.R.* v. *United States, supra,* 794 F2d at 638.

This Court frequently has noted that the powers granted to the ICC to prohibit unreasonable carrier practices are extremely broad. The ICC's recodified statutory powers at 49 USC § 10701(a) are derived from prior statutes affecting both rail and motor carriers. The statute states that the ICC's reasonableness powers extend to "any practice related to transportation or service provided by a carrier". The predecessor to this provision originally enacted by Congress in 1906 emphasized the breadth of these powers even more strongly, applying them to "any regulations or practices whatsoever" of a carrier affecting common carrier rates and charges. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.,* 215 U.S. 452, 475 (1910). The ICC itself has construed its unreasonable practice powers as "broad enough to cover any unreasonable practice of a common carrier" and control "whatever regulations and practices" enter into the application of carrier rates. *Postal Telegraph Cable Co.* v. *W. U. Telegraph Co.,* 59 ICC 512, 516 (1920); *Stopping of Cars in Transit to Complete Loading,* 36 ICC 130, 132 (1915).

The categories of carrier conduct which the ICC has found to constitute unreasonable practices range across the entire spectrum of transportation activities having an impact on the charges ultimately paid by shippers. Very early in its existence, the ICC held that it could be an unreasonable practice for carriers to publish rate

provisions and billing documents which were likely to mislead the shipping public or suggest that rates higher or lower than those actually on file would be charged. *In the Matter of Released Rates,* 13 ICC 550, 562, 564 (1908). The ICC has repeatedly held that the fact that a rate is contained in a published tariff and is found to be reasonable in its own right does not prevent application of that rate from constituting an unreasonable practice in particular circumstances. *National Wool Growers Association* v. *Union Pacific R. Co.*, 49 ICC 55, 58 (1918); *Albers Bros Milling Co.* v. *Great Northern Ry. Co.*, 256 ICC 491, 500 (1943). Both this Court and the ICC have held that shippers injured by unreasonable carrier practices are entitled to recovery of money damages from the carriers involved. *Hewitt-Robins, Inc.* v. *Eastern Freightways, supra,* 371 U.S. 84 (1962); *Adams* v. *Mills,* 286 U.S. 397, 407-8 (1932); *Bud Antle, Inc.* v. *United States,* 593 F2d 865, 875 (9th Cir. 1979); *Albers Bros Milling Co.* v. *Great Northern Ry. Co., supra,* 256 ICC at 500; *Hawkins & Son* v. *Director General,* 80 ICC 225, 227 (1923).

The apparent logic of the Fifth Circuit and the minority of lower courts in declining to recognize the power of the ICC to find that continuing rate misrepresentation constitutes an unreasonable practice is either that (1) the ICC lacks power to find that assessment of a published rate constitutes an unreasonable practice or (2) the practices alleged by petitioner and noted by the ICC in *Negotiated Rates* could never be found to be unreasonable within the meaning of 49 USC § 10701(a). Both of these propositions are patently untenable. From the very onset of regulation, the ICC has exercised its powers to declare carrier rates and practices unreasonable to relieve shippers from their obligation to pay

published carrier charges. This fact is imbedded in the very quotation of Justice Brandeis recited by the Fifth Circuit in support of the primacy of filed rates. (B-5). The full statement of law by Justice Brandeis explaining the interrelation between the ICC's reasonableness powers and the duty of carriers to collect their published charges reads as follows:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.* Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination. *Louisville & Nashville Ry.* v. *Maxwell,* 237 U.S. 94, 97 (1915) (Emphasis added).

Significantly, the Fifth Circuit's quotation of this language in its opinion (B-5) *omits* the reference of Justice Brandeis to the power of the ICC to prevent application of a filed rate by finding it to be unreasonable. Similar deletions of this critical phase appear in other decisions of lower courts which cite this quotation as establishing a requirement of immutable adherence to published tariffs. See, e.g., *INF Ltd.* v. *Spectro Alloys Corp.,* 690 F. Supp. 808, 810 (D. Minn. 1988).

These deletions of Justice Brandeis' critical phrase show a fundamental lack of understanding of the numerous court decisions differentiating between the "legal rate" contained in the carrier's tariff, which the carrier is initially required to charge, and the "lawful rate" ultimately established by an ICC decision following a shipper objection that the "legal rate" was unreasonably high. *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932); *Middlewest Motor Freight Bureau* v. *U.S.*, 433 F2d 212, 238-39 (8th Cir. 1970), *cert. den.* 402 U.S. 999 (1971). It is only the *lawful* rate which the shipper ultimately is required to bear. The Fifth Circuit and other lower courts simply are wrong in their assertion that the "filed tariff doctrine" created by 49 USC § 10761 bars the ICC from finding a tariff or its application to be unreasonable so as to allow a shipper to avoid payment of the charges contained in that tariff.

There similarly is no merit to any argument that the unreasonable practice defenses asserted by Petitioner and described in *Negotiated Rates* must be rejected because of any particular inconsistency with the rate filing requirements of 49 USC § 10761. The fact that the claimed unreasonable practice involves fraud or misrepresentation in description of the carrier's legally effective rates does not constitute a bar to the ICC's exercise of its unreasonable practice jurisdiction. The line of cases which holds that fraud, misrepresentation, or other equitable defenses may not be asserted in carrier actions to collect published rates applies only to those situations where shippers seek to invoke the powers of equity granted to *courts*. No similar prohibition, however, applies to the ICC. Under the ICC's reasonableness powers, the same facts which could not be asserted as a common law or equitable defense to payment of freight charges in a court proceeding may

constitute a basis for the ICC to find either that published rates themselves are unreasonable or that the collection of such rates would be unreasonable.

The decisions of the ICC and the courts are replete with examples of situations in which equitable circumstances which could not be asserted as common law defenses to collection of filed rates in court proceedings have been found to support ICC findings of unreasonableness. For example, even before the effectiveness of deregulation legislation concerning the rail and motor carrier industries in 1980, the ICC had recognized that public policy considerations concerning rail rates warranted a presumption that any published rate in excess of the rate agreed upon between a carrier and shipper and relied upon by the shipper would be unreasonable. *Ex Parte* No. 358-F, *Change of Policy, Rail Road Contract Rates*, 45 Fed. Reg. 21719 (April 2, 1980, reported in *Cleveland Cliffs Iron Co.* v. *ICC*, 664 F2d 568, 573 (6th Cir. 1981). See also, *Coal Colstrip, Kuehn and Decker, MT, To Superior WI*, 364 ICC 152 (1980); *Unit Train Rates — Coal — Burlington Northern, Inc.*, 364 ICC 186 (1980), *affd. sub nom Iowa Power and Light Co.* v. *Burlington Northern, Inc.*, 647 F2d 796 (8th Cir. 1981), *cert. den.* 455 U.S. 907 (1982); *Annual Volume Rates on Coal — Flint Creek, AR*, 364 ICC 753 (1981), *affd. sub nom. Burlington Northern, Inc.* v. *United States*, 679 F2d 915 (D.C. Cir. 1982).

Many prior decisions of the ICC also had recognized that an agreement or course of dealing between a shipper and a carrier to charge particular rates could be given evidentiary effect in determining whether higher published rates should be found unreasonable. *Piedmont Mills, Inc.* v. *Norfolk & W. R. Co.*, 296 ICC 481, 485 (1955) (carrier misquotation and acceptance of lower charges over 3 year period); *Ideal Cement Co.* v. *Atchison, T. & S.F.*, 280 ICC 55, 59 (1951) (confusing

tariff and carrier offer to establish clarifying tariff); *Carson Iron & Steel Co.* v. *Atlantic & N. C. R. Co.*, 237 ICC 724, 728 (1940) (carrier error in tariff publication); *Sheboygan Fruit Box Co.* v. *Chicago & N. W. Ry. Co.*, 214 ICC 157 (1936) (mutual assumption that cancelled rate had remained in effect); *Sutherland Paper Co.* v. *Ann Arbor R. Co.*, 215 ICC 344 (1936); *Armour & Co.* v. *Northern Pacific Ry. Co.*, 209 ICC 277 (1935); *C. A. Wagner Construction Co.* v. *Chicago & N. W. Ry. Co.*, 208 ICC 767 (1935) (emergency need to move shipments before agreed rate could be placed in effect).

In still other cases, the ICC had found that it would be inequitable and an unreasonable practice to apply published tariffs in particular transportation circumstances. *Thermofil, Inc.* v. *Jones Transfer Co., supra*, 355 ICC 828 (charges for trailer use by carrier not owning trailer); *Iowa Beef Processors, Inc.* v. *Western Transportation*, ICC Docket No. 37521 (not printed; September 14, 1981), cited in *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231. *Standard Brands, Inc.* v. *Central R. Co. of N. J., supra*, 350 ICC 555 (document notation requirement unrelated to transportation service).

The policy announced by the ICC in *Negotiated Rates* is a logical extension of these previously exercised powers. The ICC noted that the primary evil which the tariff filing requirement of 49 USC § 10761 was designed to prevent — discrimination between shippers — had been reduced in practical significance by substantial increases in carrier rate flexibility adopted after the Motor Carrier Act of 1980. *Negotiated Rates, supra*, 3 ICC 2d 104. The ICC decided that assignment of controlling weight to prior negotiations or misrepresentation would be granted only on a case-by-case basis, reflecting the particular facts of individual situations. *Id.* at 106, 107. On a particular record, if it could be shown that a shipper-carrier negotiation

of rates without a subsequent carrier rate filing was effected to obtain discriminatory treatment, the ICC would be free to reject a finding of unreasonable practices and protect the policies of 49 USC § 10761. As the ICC noted, its right to change its interpretation of statutes to meet changing factual or policy situations is clearly established by decisions of this Court in *Chevron U.S.A., Inc.* v. *Natural Resource Defense Council*, 467 U.S. 837 (1984) and *American Trucking Association* v. *Atchison T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967).

The decision below is totally at odds with the decision of the Eleventh Circuit in *Seaboard System R.R.* v. *United States, supra*, 794 F2d 635. The Eleventh Circuit, unlike the Fifth Circuit below, was willing to allow the ICC to give effect to the understanding between the shipper and carrier rather than forcing adherence to the higher filed rate. The carrier's representation in *Seaboard* that the lower rate was effective resulted from the carrier's own misinterpretation of what the Eleventh Circuit described as a "somewhat unclear published tariff." *Id.* at 636. Closer analysis of the tariff, first by the carrier and then by the ICC revealed, however, that the tariff was unambiguous and provided for a higher rate than had been quoted and agreed to. The court in *Seaboard* noted that the critical factor for the ICC was "the carrier's continuing conduct in misleading the shipper as to the applicable tariff rate." *Id.* at 639. When the carrier advised the shipper that it had changed its interpretation of the tariff, the ICC ruled that the unreasonableness of the carrier's practice came to an end. *Id.* The Fifth Circuit's characterization of *Seaboard* as a case which turns on the ambiguity of the underlying tariff thus is incorrect. The Eleventh Circuit's approval of the ICC's finding that the carrier's breach of its rate agreement consti-

tuted an unreasonable practice thus is directly contrary to the Fifth Circuit's unwillingness to allow the ICC to consider the rate agreement between Petitioner and Caravan.

There is no merit to an argument that any rejection or diminution of the ICC's rate reasonableness powers is dictated by this Court's decision in *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986). In *Square D*, the Supreme Court noted that the principle of inviolability of filed rates from court attack under common law had been extended to bar antitrust treble damage actions against rates established by conspiracy in *Keogh* v. *Chigago & Northwestern R. Co.*, 260 U.S. 156 (1922). In affirming the continuing vitality of *Keogh*, the Court in *Square D* made three specific references confirming the powers of the ICC to set aside rates contained in published tariffs. At two points, the Court made specific reference to its holdings in prior cases that rates in published tariffs are binding on shippers and carriers "until suspended or set aside" by the ICC. *Square D, supra*, at 416, 418 n. 22. Moreover, in a lengthy footnote, the Court cited portions of the opinion of Justice Brandeis in *Keogh* describing the unreasonableness remedy available to shippers before the ICC and citing the existence of this remedy as the basis for barring parallel remedies under the antitrust laws.

> What rates are legal is determined by the Act to Regulate Commerce. Under § 8 of the latter act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable

> attorney's fee. Section 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. *If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. Square D, supra,* at 416, n. 18 (Emphasis added).

Any suggestion that *Square D* constitutes authority for the proposition that a filed rate may not be set aside by the ICC simply is incorrect. Rather, it was the existence of an unreasonableness remedy before the ICC that led the court in *Square D* and *Keogh* to conclude that Congress intended to bar attacks on filed rates under the antitrust laws.

II.

A SHIPPER WHICH RAISES THE DEFENSE OF UNREASONABLE PRACTICES IN A MOTOR CARRIER ACTION TO COLLECT FREIGHT CHARGES IS NOT REQUIRED TO PAY THE CHARGES TO THE CARRIER PRIOR TO CONSIDERATION OF ITS DEFENSE BY THE ICC.

The Court should also reject the statement in the Fifth Circuit opinion that shippers raising unreasonable practice defenses to carrier actions to collect freight charges are required to pay the charges even while their defenses are under consideration before the ICC. It is well settled that issues of unreasonableness of rates and unreasonableness of practices under

49 USC § 10701(a) fall within the exclusive primary jurisdiction of the ICC. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *United States* v. *Western Pacific Railroad*, 352 U.S. 59, 68 (1956).[3] It likewise is well established that shipper defendants in carrier actions to collect freight charges are entitled to assert as defenses either the contention that the rates sought to be collected are statutorily unreasonable or that collection of these rates would constitute a statutorily prohibited unreasonable practice. *United States* v. *Western Pacific Railroad, supra*, 352 U.S. at 71-73; *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231. In these circumstances, courts regularly have recognized that shippers pleading unreasonable rate or practice defenses to carrier collection actions in court are entitled to stays of the collection actions pending determination of their unreasonableness defenses by the ICC. *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231, 1232; *Seaboard System R.R.* v. *United States, supra*, 794 F2d at 639; *Interoceanic Commodities Corp.* v. *Chicago G.W. Ry. Co.*, 309 ICC 710, 612 (1960); *Bushman Dock & Term.* v. *Chesapeake & O. Ry. Co.*, 302 ICC 183, 186 (1950).

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[3] The ICC's statement in *Negotiated Rates* that its role in a referred case is "advisory" relates only to the fact that the power to impose an actual remedy on a carrier found to have engaged in unreasonable practices rests with the referring court rather than the ICC. *Negotiated Rates, supra*, 3 ICC 2d 107. Review by the referring court of the Commission's findings as to unreasonableness issues is subject to ordinary restrictions on judicial review of federal agency action. The referring court is not free to substitute its own judgment for that of the Commission. See *Keller Industries, Inc.* v. *U.S.*, 449 F2d 163, 174, at n. 31 (9th Cir. 1971), and cases cited therein.

Both the courts and the ICC have recognized specifically that unreasonableness of a rate or practice is an affirmative defense to a carrier collection action, as opposed to an independent claim to be raised by counterclaim or separate suit. *In Re Penn Central Transportation Co.*, 477 F2d 841, 844 (3rd Cir. 1973), *cert. den.* 414 U.S. 885, 923 (1974); *Lawson Concrete Co.* v. *C. & N. W. Transp. Co.*, 367 ICC 109, 111 (1982). Notwithstanding early statements that shippers alleging rates to be unreasonable were required to first pay the rates and then file reparation actions to recover them, later ICC decisions eliminated this requirement by granting specific approval to the carriers' non-collection of rates ultimately found to be unreasonable. See, i.e., *Bradford Coal Co.* v. *Baltimore & O. R. Co.*, 305 ICC 761, 766-67 (1959); *New England Box Co.* v. *Boston & M. R.*, 305 ICC 133, 135 (1958); *Foremost Food & Chemical Co.* v. *Alton & S. R.*, 318 ICC 35, 39 (1962).

There is no precedential support for the statements of the Fifth Circuit below that "a court may not stay enforcement of the filed tariff rate on the ground that the shipper has pled unreasonableness" or that "a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the commission."[4] (B-9 at n. 6, B-8). The only case cited by the Fifth Circuit in support of these propositions is *Southern Pacific Transp. Co.* v. *City of San Antonio*, 748 F2d 266 (5th Cir. 1984). *Southern Pacific* arose out of this Court's opinion in *Burlington Northern* v. *U.S.*, 459 U.S. 131 (1982). It essentially enforced this Court's holding that

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[4] These statements by the Fifth Circuit in reality are merely *dicta*. The effect of the Fifth Circuit's opinion was to foreclose the litigation of reasonableness issues before the ICC.

reviewing courts lack the power to delay the implementation of proposed rate increases found not to be unreasonable by the ICC. *Southern Pacific Transp. Co.* v. *City of San Antonio, supra,* at 748 F2d 273.

The decision in *Burlington Northern* reflected this Court's concern that preventing *future* rate proposals from taking effect on the grounds of alleged unreasonableness would irrevocably prejudice the carriers because of their lack of a remedy to recover revenue shortfalls from shippers for the period of litigation. *Burlington Northern* v. *U.S., supra,* at 459 U.S. 139, 141-143. This irreparable harm to the carrier is not present in cases in which unreasonableness of a rate or rate practice is raised as a defense to a carrier action to collect published charges on *past* shipments. In that situation, the carrier will always retain its collection remedy against the shipper in the event that the shipper is unsuccessful in obtaining a determination of unreasonableness from the ICC. There is no indication in *Burlington Northern* that this Court intended to foreclose shipper rights to raise the unreasonableness defenses to actions to collect past shipments which this Court had recognized in *United States* v. *Western Pacific Railroad, supra,* 352 U.S. 59.

III.

THE IMPORTANT FEDERAL INTEREST IN SECURING LOWER RATE SCHEDULES FOR GOVERNMENT TRAFFIC REQUIRES COURTS TO ACCEPT DELAYED ASSERTION OF SUCH INTERESTS IN COURT PROCEEDINGS.

Certiorari also should be granted for the purpose of protecting the statutorily recognized public interest in securing lower and more competitive rates for transportation for the government. 49 USC § 10721(b)(1) provides that such transportation may be provided without

charge or at reduced rates. Carriers performing transportation falling within this exemption are permitted to "agree with the government to a lower rate schedule for government carriage." *Baggett Transportation Co.* v. *United States*, 670 F2d 1011, 1012 (Cl. Ct. 1982). The defenses of prior agreement and estoppel against the assessment of a higher published rate are available in actions involving traffic in this category. *Jetco, Inc.* v. *U.S., supra*, 11 Cl. Ct. at 845. The government traffic exemption is applicable even to shipments initially billed to private shippers rather than to the government when the government "directly and completely reimburses the party which initially bears the freight charges," where "the government receives the entire benefit of the reduced rates," and where the shipper "is merely acting as a conduit" for passage of the reduced rate through to the government. *Interpretation of Govt. Rate Tariff — Eastern Central*, 323 ICC 347, 349, 351, 352 (1964), *rev'd on other grounds, Middle Atlantic Conference, et al.* v. *United States*, 265 F. Supp. 448 (D. Md. 1967). Information presented in affidavits submitted below prior to the entry of summary judgment indicated that such factors may be applicable to Petitioner's shipments to governmental units.[5]

The significant public interest in ensuring low-cost transportation for governmental shipments is impaired by the decision below to bar consideration of this issue because Petitioner did not raise it initially as a legal issue in opposition to summary judgment. While trial courts have discretion to decline reconsideration of legal arguments which are not raised initially in opposition to summary judgment motions, such discretion is not unlimited. Delays in submitting legal arguments should not be fatal where the failure to hear such argu-

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[5] (Affidavit of S. Spiritas, May 1, 1986, at pp. 2-3.)

ments would result in a miscarriage of justice or frustrate a significant public policy. *McCrea* v. *Harris County Houston Ship Channel Nav. Dist.*, 423 F2d 605, 610 (5th Cir. 1970); *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1232. The legislative history of 49 USC § 10721(b)(1) and its predecessors shows a clearly expressed intention by Congress to maintain a preferred position for governments in their transportation dealings. See Senate Report No. 410, U.S. Code Cong. and Admin. News, 85th Congress, First Session (1957), p. 1782; *Increased Freight Rates, E. W. & S. Territories, 1956*, 300 ICC 633, 669 (1957). Assertion of such defenses by Petitioner in connection with its shipments for the government should not have been rejected.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record

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Counsel for Petitioner

Dated: May 30, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING REHEARING

(United States Court of Appeals – Fifth Circuit)

(Filed March 1, 1989)

(IN THE MATTER OF: CARAVAN REFRIGERATED CARGO, INC., Debtor; SUPREME BEEF PROCESSORS, INC., Appellant, versus ROBERT YAQUINTO, JR., Trustee for Caravan Refrigerated Cargo, Inc., Appellee — No. 88-1209; Appeal from the United States District Court for the Northern District of Texas)

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion 02/02/, 5 Cir., 1989, __ F.2d __)
(MARCH 1, 1989)

Before: REAVLEY, HIGGINBOTHAM
and SMITH, Circuit Judges.

PER CURIAM:

☑ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

REHG-6

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B

OPINION

[*PUBLISHED AT* 864 F.2d 388]

(United States Court of Appeals — Fifth Circuit)

(Filed February 2, 1989)

(In the Matter of CARAVAN REFRIGERATED CARGO, INC., Debtor, SUPREME BEEF PROCESSORS, INC., Appellant, v. Robert YAQUINTO, Jr., Trustee for Caravan Refrigerated Cargo, Inc., Appellee — No. 88-1209; Appeal from the United States District Court for the Northern District of Texas)

Before: REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This is an archetypal "negotiated rate case" involving a motor carrier and a shipper of beef. The well-worn choreography for these cases involves a motor carrier's action against a shipper to collect for undercharges; that is, to collect the difference between the higher rate which the carrier has filed with the Interstate Commerce Commission (the "Commission") and the rate which the parties had negotiated.

In the action before us, the district court refused to refer the case to the Commission and granted summary judgment for the carrier over the shipper's objection that the filed tariff was unreasonable. The shipper sought the district court's reconsideration on the ground that its business with the carrier was at the behest of the government, but the court refused to reconsider. Agreeing with the district court that sum-

mary judgment was appropriate and that the motion for reconsideration was properly denied, we affirm.

I.

A GREAT DEAL WHILE IT LASTED.

Supreme Beef Processors, Inc. ("Supreme Beef"), is a major producer and supplier of beef products to the United States Government. Caravan Refrigerated Cargo, Inc. ("Caravan"), supplied refrigerated transport services to Supreme Beef for several years prior to Caravan's bankruptcy. According to Supreme Beef, it had a longstanding agreement with Caravan that Caravan would "meet or beat" any motor carrier rate quoted by a competing carrier. This agreement enabled Supreme Beef to rely upon low-cost transportation for purposes of preparing its bids. In return, Caravan was guaranteed a large volume of shipping business from Supreme Beef.

During their relationship, Supreme Beef and Caravan continually negotiated the transportation rates to assure competitiveness with other carriers' rates. Caravan billed Supreme Beef for the agreed rates, and Supreme Beef paid those bills. The negotiated rates for the shipments in question here, however, were not the same as those that Caravan had filed with the Commission: The filed rates were higher. From the summary judgment record, it appears that Supreme Beef was unaware of the variance, and had relied upon Caravan's rate quotations. After Caravan's bankruptcy, the trustee filed the instant suit to collect from Supreme Beef the difference between the negotiated rates and the filed rates for those periods during which Caravan did not have the actual, negotiated rates on file; the parties agree that the difference amounts to $70,227.08.

On appeal, Supreme Beef contends that the court erred in failing to refer the case to the Commission, where it could contest the reasonableness of the filed rates, or in the alternative, to deny the summary judgment motion on the basis of Supreme Beef's defense of unreasonableness. Supreme Beef also urges that we find error in the district court's refusal to vacate the summary judgment order after Supreme Beef had presented factual evidence as to the government-carrier exemption.

II.

WHERE'S THE BEEF?

Supreme Beef's first contention is that this case was litigated in the wrong forum. It invokes the primary jurisdiction doctrine and contends that the district court should have referred the dispute to the Commission in the interests of uniformity and expert administration of issues of transportation policy. *See United States* v. *Western Pac. R.R.*, 352 U.S. 59, 65, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

Under the primary jurisdiction doctrine, "a district court trying a case under the Interstate Commerce Act must, if presented with such an issue, stay its proceedings and refer the case to the Commission." *City of New Orleans* v. *Southern Scrap Material Co.*, 704 F.2d 755, 758 (5th Cir. 1983) (citing *ICC* v. *Atlantic Coast Line Ry.*, 383 U.S. 576, 579, 86 S.Ct. 1000, 1003, 16 L.Ed.2d 109 (1966)). In addition, we have stated that when "the reasonableness of a rate is at issue, 'there must be preliminary resort to the Commission.'" *Southern Pac. Transp. Co.* v. *City of San Antonio*, 748 F.2d 266, 272 (5th Cir. 1984) (quoting *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291, 42 S.Ct. 477, 479, 66 L.Ed. 943 (1922)). Supreme Beef thus contends that because Caravan's suit was based upon section

10761(a) of the Interstate Commerce Act, and because it properly pled unreasonableness as a defense, the district court was required to refer the case.

Here, however, the facts do not raise technical or complex issues, regarding appropriate rates, that require the expert administration of the Commission and thereby invoke the primary jurisdiction doctrine. Supreme Beef bases its charges of unreasonableness upon the unfairness of having to pay the filed rate because Caravan "failed to get its paperwork done." In reality, this dispute concerns only the applicability of 49 U.S.C. § 10761(a), which provides that a carrier subject to the jurisdiction of the Commission "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff." [1] The purpose of this statute is to prevent large suppliers and shippers from negotiating "under-the-table" tariffs, lower than the filed tariffs, and thus undercutting competition from smaller suppliers who must also use the highways of interstate commerce to get their goods to market.

Judicial interpretations of section 10761(a) and its predecessors have given rise to the "filed tariff doctrine," which Justice Brandeis ably explained as follows:

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[1] Section 10761(a) provides in full:

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & Nashville Ry. v. *Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 495, 59 L.Ed. 853 (1915).

Supreme Beef contends, however, that the filed tariff doctrine has been weakened and that the district court should have referred the case so that it could contest the reasonableness of Caravan's filed rates in light of Caravan's misquotations. As support for its argument, Supreme Beef cites the Motor Carrier Act of 1980; an advisory opinion from the Commission, *National Indus. Transp. League (Ex Parte MC-177)*, 3 I.C.C.2d 99, 86 Fed.Carr.Cas. (CCH) ¶ 37,284 (Aug. 7, 1987); and a recent Eleventh Circuit opinion upholding a Commission ruling that a carrier had engaged in an unreasonable practice by misquoting rates to the shipper.[2]

Supreme Beef's claim is that with the Motor Carrier Act, Congress sought to make the industry more competitive by reducing the burden which filing tariffs imposes and that the Commission recognized this change when it declared in its advisory opinion that "equitable defenses to rigid application of filed tariff

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[2] *See Seaboard Sys. R.R.* v. *United States*, 794 F.2d 635, 537 (11th Cir. 1986).

rates should be available on a case-by-case basis." Moreover, as the *Seaboard System* case demonstrates, a circuit court of appeals has approved the Commission's willingness to find that misquotation constitutesd an unreasonable practice. We respond to each of these authorities in turn.

A. THE MOTOR CARRIER ACT.

We cannot agree that the 1980 Act abrogates the filed tariff doctrine, as we cannot ignore the plain fact that when Congress examined this area in 1980, it did so in light of section 10761(a) and the long-standing judicial interpretations of that statute. In fact, the changes which Congress did make, a filing exemption for contract carriers, for example,[3] indicate that its intent was to leave the filed tariff doctrine very much intact. Any change in the law must therefore come from Congress, not this court.

In an analogous context, the Supreme Court has refused to overturn doctrine established prior to the Motor Carrier Act which Congress did not expressly abrogate. In *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986), the Court upheld its previous ruling in *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Under the "*Keogh* doctrine," shippers could not bring treble-damage antitrust actions against carriers in connection with filed tariffs, though governmental and injunctive antitrust actions against

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[3] *See* 49 U.S.C. § 10761(b), which provides that

> "[t]he Commission may grant relief from subsection (a) of this section when relief is consistent with the public interest and . . . transportation policy." Contract carriers are those carriers that, like Caravan, have established a contractual arrangement with a shipper and that must adjust rates more quickly than the normal filing process permits.["]

"concerted rate-making" activities were still available. Answering the argument that the *Keogh* doctrine should be overturned in light of Congress's intent to promote competition in the transportation industry through the Motor Carrier Act, Justice Stevens wrote,

> [W]e may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy — but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of law in 1980.

Square D, 476 U.S. at 420, 106 S.Ct. at 1928.

The facts here present an even more persuasive case for deference. One of the Motor Carrier Act's most significant changes creates an *exemption* from filing requirements for contract carriers, evincing Congress's desire that all other carriers should continue to adhere to the filing requirements. Moreover, section 10761(a) and the filed tariff doctrine, integral as they are to the publication and enforcement of reasonable, non-discriminatory rates, are not so obviously unwise and anti-competitive as Justice Stevens seems to suggest the *Keogh* doctrine may be. Thus, following the Supreme Court's lead in *Square D*, we are unwilling to permit Supreme Beef's unreasonableness defense to undermine the filed tariff doctrine.

B. NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE.

The Commission's advisory opinion in *National Industrial Transportation League (Ex parte MC-177)* is inapposite to

this case. The Commission's expression of its decision to allow equitable defenses in disputes before it regarding the reasonableness of rates has, of course, no binding effect upon this court.[4]

Instead, our decision is governed by our opinion in *Southern Pacific Transportation Co.* v. *City of San Antonio.* There, we overturned a district court's stay of an execution of judgment by two railroads seeking to collect undercharges for shipments of coal to a city power plant. The district court had granted the stay pending the Commission's determination of the reasonableness of the railroad's filed rates. We stated,

> The Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable.

748 F.2d at 274.

Thus, our precedent declares that a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the Commission. The rule is necessary to protect the filed tariff doctrine and its under-

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[4] *See Pacific Gas & Elec. Co.* v. *Federal Power Comm'n*, 506 F.2d 33 (D.C.Cir. 1974). The court noted, "[A] general statement of policy only announces what the agency seeks to establish as policy . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* at 38 (footnote omitted).

lying policy of ensuring reasonable and non-discriminatory rates.[5]

Our decision here is an application of the same rule: A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission.[6] Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.

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[5] *See id.*; *see also Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C.Cir. 1986). There, the court declared invalid a Commission regulation that would have allowed motor carriers to leave a "paper-trail" of negotiated tariffs with shippers rather than file tariffs with the Commission. Judge (now Justice) Scalia explained further the policy behind the requirement that shippers and carriers adhere to the filed tariffs:

> That requirement is utterly central to the [Interstate Commerce] Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory, *see* 49 U.S.C. §§ 10701 & 10741(b), and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, *see* 49 U.S.C. §§ 10708(a)(1) & 11701(a).

[6] Supreme Beef's attempt to distinguish *Southern Pac. Transp. Co.* v. *City of San Antonio* is unpersuasive. It observes that the case involved the reasonableness of railroad rates rather than motor carrier rates and points out that the Commission has long reviewed the reasonableness of railroad rates, while only recently having decided, via its advisory opinion in *National Indus. Transp. League*, to review the reasonableness of motor carrier rates. This distinction, however, only serves to strengthen the precedential value of *Southern Pacific* in the present context. Again, the rule stated in that case is that a court may not stay enforcement of the filed tariff rate on the ground that the shipper has pled unreasonableness or sought a hearing before the Commission. Thus, regardless of whether the Commission is willing to consider the reasonableness of motor carrier or railroad rates, the court may not put the brakes on the filed tariff doctrine.

C. SEABOARD SYSTEM.

Supreme Beef would also find support for its referral argument in *Seaboard System R.R.* v. *United States*, in which the Eleventh Circuit upheld the Commission's ruling in a negotiated rate case that a carrier had engaged in an unreasonable practice by misquoting rates to a shipper. The Commission therefore refused to permit the carrier to collect for undercharges. The Commission found authority for its ruling in two different statutes: 49 U.S.C. § 10701(a), which provides that a "practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable," and 49 U.S.C. § 10704 (a)(1), which authorizes the Commission to order a carrier to stop a violation.

Supreme Beef thus contends that because the Commission is willing to find that misquotation constitutes an unreasonable practice, and because the Eleventh Circuit has recognized the Commission's authority to make such findings, this court also should recognize that authority and hold that it was error for the district court to refuse to submit the case to the Commission in the face of Supreme Beef's allegations of misquotation and unreasonableness.

However, Supreme Beef does not tell the whole story of *Seaboard System*. Central to that case was the Commission's finding that the tariff filed with the Commission and sought to be enforced was not "plain to the ordinary user." 794 F.2d at 637. The importance of this additional finding cannot be understated; under the filed tariff doctrine, shippers are charged with constructive knowledge of the tariffs which the carrier has filed with the Commission. *See Maxwell*, 237 U.S. at 97, 35 S.Ct. at 495. Thus, it is only when that tariff is unclear

or ambiguous to the ordinary user that the Commission is willing to relax the filed tariff doctrine and consider the possibility that misquotation might be an unreasonable practice.

Supreme Beef has not claimed nor offered any evidence to show that the rates which Caravan had filed with the Commission were not plain to the ordinary user. *Seaboard System* therefore offers no support for its contentions of unreasonableness and does not represent a weakening of the filed tariff doctrine.

III.

ADDITIONAL BEEFS.

Supreme Beef charges that the district court's summary judgment order was in error on two additional grounds. First, it argues that the trustee's cross-motion for summary judgment was untimely in light of the district court's having set the deadlines for such motions, pursuant to Fed.R.Civ.P. 16(b), at December 15, 1987. The trustee filed his cross-motion on December 29, 1987. Second, it asserts that its motion for reconsideration presented triable issues of fact as to Caravan's special status as a carrier of government goods.

In making this first argument, Supreme Beef ignores the fact that a district court may grant summary judgment for the non-movant *sua sponte*. We have noted that when "one party moves for summary judgment the district court, in an appropriate case, may grant summary judgment against the movant, even though the opposite party has not actually filed a motion for summary judgment." *Landry* v. *G.B.A.*, 762 F.2d 462, 464 (5th Cir. 1985) (citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d*

§ 2720)). The cited treatise explain[s] that granting summary judgment in favor of the non-moving party is

> in keeping with the objective of Rule 56 to expedite the disposition of cases, and, somewhat more remotely, with the mandate of Rule 54(c) requiring the court to grant relief to which a party is entitled 'even if the party has not demanded such relief in his pleadings.'

10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d* § 2720 at 33 (quoting Fed.R.Civ.P. 54(c)). We see no reason why the same reasoning should not apply in a situation where, as here, the non-movant has failed to meet a motion deadline.

Second, Supreme Beef makes the argument that had the district court considered the fact that Caravan held a Master Certificate of Public Convenience exempting it, as a carrier of government goods, from normal filing requirements,[7] the court then would have had to enforce the negotiated rate rather than the filed rate. However, Supreme Beef failed to call the court's attention to this argument in its motion for summary judgment. It raised the point for the first time in its motion for reconsideration.

We note that a motion to reconsider or amend should not be employed "to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." *Fontenot* v. *Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986). Our review of the record indicates that Supreme Beef made no showing that it had newly discovered the evidence it presented regarding the government contracts, nor did it bring

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[7] *See* 49 U.S.C. § 10721.

that evidence to the court's attention prior to summary judgment, or marshal legal support for its government-exemption claim.

Thus, Supreme Beef's motion for reconsideration was nothing more than an attempt to present a new legal theory to the court on the basis of affidavits it already had submitted with its original summary judgment motion. The district court therefore properly denied the motion for reconsideration.

IV.

CONCLUSION.

Supreme Beef has failed to persuade us that we should weaken the filed tariff doctrine by holding that a defense of unreasonableness will trigger a referral to the Commission. Nor has it demonstrated that the district court acted improperly in granting summary judgment for Caravan and denying the motion for reconsideration. Hence, the district court's summary judgment order is in all respects AFFIRMED.

APPENDIX C

ORDER DENYING RECONSIDERATION

(United States District Court —
Northern District of Texas — Dallas Division)

(Filed March 4, 1988)

(ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, v. SUPREME BEEF PROCESSORS, INC., Defendant — CA 3-87-2274-R; *Entered on Docket pursuant to F.R.C.P. Rules 58 and 79a*)

On January 20, 1988, this Court entered its Memorandum Opinion and Order granting Plaintiff's motion for summary judgment and denying Defendant's cross-motion for summary judgment. This Court entered a Final Judgment in accordance with that opinion, and Defendants have filed a "motion to reconsider." [1] This motion will be **DENIED**.

First, to the extent Defendant reargues its position that the filed tariff doctrine is subject to equitable modification, this Court remains unpersuaded.

Second, to the extent Defendant raises for the first time its argument that the shipments in question were conducted pursuant to a statutory exemption to the filed tariff doctrine, this Court considers the argument improper. Defendant has completely changed its tactic in defending this lawsuit after entry of final judgment. [2]

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[1] This Court may properly entertain Defendant's motion as a motion to alter or amend a judgment under Rule 59(e).

[2] Defendant has submitted an affidavit purporting to illustrate that Caravan's activities were conducted pursuant to 49 U.S.C. § 10721, and that no tariffs were required to be filed.

Nowhere in its brief supporting its motion does Defendant explain why this new theory was not previously offered to the Court. *See e.g., Frito-Lay of Puerto Rico, Inc.* v. *Canas*, 92 F.R.D. 384, 391 (D.P.R. 1981).

Third, Defendant's argument regarding its government exemption does not appear to have any merit. This Court is persuaded by Plaintiff's brief in response that the shipments in question did not fall into any government exemption. Consequently, even if Defendant's new theory were properly before this Court, it would not convince this Court that the prior judgment was erroneous.

Accordingly, it is the **ORDER** of this Court that Defendant's motion for reconsideration is hereby **DENIED**.

SIGNED this 4th day of March, 1988.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

APPENDIX D

MEMORANDUM OPINION AND ORDER
[OF JANUARY 20, 1988]

(United States District Court —
Northern District of Texas — Dallas Division)

(Filed January 20, 1988)

(ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, v. SUPREME BEEF PROCESSORS, INC., Defendant — CA 3-87-2274-R)

I.

This is a negotiated rate case in which Plaintiff Robert Yaquinto, Jr., as Trustee for the motor carrier Caravan Refrigerated Cargo, Inc. ("Caravan") seeks to recover on an undercharge for shipments of beef for Defendant Supreme Beef Processors, Inc. ("Supreme"). Now before this Court are the cross motions for summary judgment filed by Supreme and Caravan. Both parties agree that this case is now ripe for disposition on summary judgment. For the reasons discussed below, Supreme's motion will be **DENIED** and Caravan's motion will be **GRANTED**.

II.

The facts present an archetypical negotiated rate case. Supreme is the largest supplier of meat to the United States Department of Defense and a major supplier to the United States Department of Agriculture. Supreme's sales to government agencies are obtained on a low bid basis. Caravan has provided Supreme refrigerated transport services for several years prior to its bankruptcy filing. According to Supreme, it had a longstanding

agreement with Caravan that Caravan would "meet or beat" any motor carrier rate quoted by a competing carrier. This agreement enabled Supreme to rely on low cost transportation for purposes of preparing its bids. In return, Caravan was guaranteed a large volume of shipping business from Supreme.

During their relationship, Supreme and Caravan continually negotiated the transportation rates to assure their competitiveness with other carriers. Caravan invoiced Supreme for the agreed rates and Supreme accepted and paid the invoices. Caravan, however, did not have all these rates filed with the Interstate Commerce Commission ("ICC"). These filed rates were higher than those actually negotiated and charged to Supreme. From the summary judgment record it appears that Supreme was unaware of the variance between the negotiated rates and the rates on file with the ICC.[1] Moreover, it is undisputed that Supreme relied upon the quoted rates in using Caravan as its carrier.

Caravan filed a contract carrier application with the ICC in order to facilitate the handling of traffic for Supreme and to enable them to negotiate or set rates with more flexibility. Caravan's bankruptcy occurred prior to the contract carrier authority being approved. After Caravan's bankruptcy filing, Trustee sought to collect from Supreme the filed tariff rates for those periods Caravan did not have the actual, negotiated rates on file. Both parties admit this amount to be $70,227.08. Supreme has defended and counterclaimed on the basis of its reliance upon the negotiated rates.

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[1] Supreme's affidavits support its contention that it was unaware of the rates on file. Caravan has responded without affidavits or argument disagreeing with Supreme's contention, relying instead solely upon its legal argument.

III.

The sole legal issue presented by the cross motions is whether the filed tariff rates were superseded by Defendant's good faith reliance upon a lower negotiated rate. Defendant admits that the basic rule in this area is that tariff rates govern; this rule has now become known as the "Filed Tariff Doctrine." Nevertheless, Defendant relies upon the ICC's advisory opinion of Ex Parte No. MC-177 in which the ICC stated that equitable defenses can be used to ameliorate the harsh effect of a literal application of the Filed Tariff Doctrine. In that opinion, the ICC stated that:

> The question that we are addressing here is whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged, (and therefore presumably filed as a tariff). We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach.

Ex parte No. MC-177.[2]

Title 49 U.S.C. § 10761 states that a common carrier subject to the jurisdiction of the ICC under 49 U.S.C. § 10501 and which has filed a tariff for a service "may not charge or receive a different compensation for that

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[2]The unreasonable practice jurisdiction to which the ICC refers apparently is based on 49 U.S.C. § 10701(a) which states that:

> A rate . . . relating to transportation or service by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

transportation or service than the rate specified in the tariff . . . ." The rationale behind the Filed Tariff Doctrine is to prevent large shippers, such as Supreme, from exacting discriminatory shipping rates from carriers to the competitive disadvantage of smaller shippers. Consequently, strict adherence to the doctrine is necessitated by its intended effect:

> The rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, . . . ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

Louisville and Nashville R.R. Co. v. *Maxwell*, 237 U.S. 94 (1915).

Numerous cases have applied the Filed Tariff Doctrine to allow recovery by a carrier for the filed tariff rate notwithstanding the existence of a lower, negotiated rate. *See e.g., Consolidated Freightways Corp.* v. *Terry Tuck, Inc.*, 612 F.2d 465, 466 (9th Cir.), *cert. den'd*, 447 U.S. 907 (1980); *Aero Trucking, Inc.* v. *Regal Tube Co.*, 594 F.2d 619, 621-22 (7th Cir. 1979); *Southern Pacific Transportation Co.* v. *Campbell Soup Co.*, 455 F.2d 1219, 1221 (8th Cir. 1972). Moreover, courts have also held that equitable defenses, such as fraud and estoppel, cannot be used by a shipper to circumvent the Filed Tariff Doctrine. As the Fifth Circuit has noted, "[e]quitable considerations cannot . . . be invoked as the basis for an estoppel to collect [authorized tariff] charges. . . . Filed tariffs are public information . . . of

which shippers should be aware." *Illinois Central Gulf Railroad Co.* v. *Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). *See also, Aero Trucking, Inc.* v. *Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Chicago, Burlington & Quincy Railroad Co.* v. *Ready Mixed Concrete Co.*, 487 F.2d 1263, 1266 (8th Cir. 1973); Wade, *Hidden Liability for Freight Bills*, Mo. B.J., April-May 1987, at 175.

Defendant argues that the Motor Carrier Act of 1980 displayed a congressional intent to allow equitable modification of the Filed Tariff Doctrine. The Supreme Court, however, has already rejected this argument stating that "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. . . . The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Square D Co. and Big D Building Supply Corp.* v. *Niagara Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986).

Likewise, Defendant's argument that the ICC's advisory opinion in MC-177 is binding upon this Court is totally without support. First, MC-177 is merely an advisory opinion and as such provides no precedential value. *Pacific Gas & Electric Co.* v. *F.P.C.*, 506 F.2d 33 (D.C.Cir. 1974). Second, and more fundamentally, an administrative agency cannot overrule the statutory requirements to publish and charge rates as set forth in tariffs. Congress was fully cognizant of the well established interpretation of § 10761 when it enacted the Motor Carrier Act of 1980, and yet Congress chose not to amend that section.

Finally, this Court disagrees with Defendant's equitable argument. The equities in this case clearly favor application of the Filed Tariff Doctrine. Tariffs have the force and effect of law. *TADMS, Inc.* v. *Consolidated Freightways*, 619 F. Supp. 385 (C.D.Cal. 1985). Defendant is charged with notice of the properly filed tariffs. Consequently, its argument of ignorance is unavailing. Were this Court to excuse Defendant from

compliance with § 10761 it would be emasculating that section's ability to prevent discriminatory allowances by carriers. Moreover, § 10761(b) already provides for equitable relief in the form of the ICC's ability to grant applications for contract carrier status in exceptional situations. Defendant should have waited until Plaintiff completed such an application before relying upon negotiated rates lower than those appearing in the filed tariffs.

Consequently, this Court holds that no basis exists for excusing Defendant from its obligation to pay Plaintiff at the filed tariff rates. Parties may not enter into a valid contract for transportation at a rate lower than that contained in a published tariff. This result is affected by neither estoppel, misquotation or fraud of the carrier. *See also, Motor Carrier Audit & Collection Co.* v. *United Food Service*, CA 87-C-298 (D.Col. May 4, 1987). Since Defendant's affirmative defenses and counterclaims have no merit, Plaintiff is entitled to judgment on its claim for the undercharges. Additionally, Plaintiff is entitled to recover prejudgment interest on its claim. *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984).

Accordingly, this Court **ORDERS** the following:

1. Defendant's motion for summary judgment is **DENIED**.
2. Plaintiff's motion for summary judgment is **GRANTED**.
3. Plaintiff is **directed** to submit a proposed final judgment to this Court within **ten (10)** days from the date of this Order.

SIGNED this 20 day of January, 1988.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

APPENDIX E

MEMORANDUM OPINION AND ORDER
[OF NOVEMBER 13, 1987]

(United States District Court —
Northern District of Texas — Dallas Division)

(Filed November 13, 1987)

(IN RE: CARAVAN REFRIGERATED CARGO, INC., Debtor, ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, v. SUPREME BEEF PROCESSORS, INC., Defendant — CA 3-87-2274-R; *Entered on Docket 11-13-87 pursuant to F.R.C.P. Rules 58 and 79a*)

This is a case involving a dispute as to the amount owed by Defendant, Supreme Beef Processors, Inc. ("Supreme"), to Debtor Caravan Refrigerated Cargo, Inc. ("Debtor" or "Caravan"), brought by the Trustee in bankruptcy. Supreme and Debtor had a contractual relationship whereby Debtor would transport Supreme's beef products. The current dispute concerns the proper charges for the transportation of Supreme's products by Debtor. Essentially, the question turns on whether Debtor was bound by an alleged agreement which gave Supreme a discount rate or if Debtor is entitled to recover from Supreme for the higher, actual rates on filie during the relevant time period. Now before this Court is Supreme's motion for referral of this essential question to the Interstate Commerce Commission ("ICC"). This motion will be **DENIED**.

Citing the ICC's specialized competence in matters pertaining to the reasonableness of transportation rates, Supreme argues that referral is mandatory. In support of

this proposition, Supreme refers to several cases discussing the wisdom of referral in certain instances, and to 28 U.S.C. § 1336(b).[1] After reviewing these authorities, however, this Court is not convinced that referral is mandatory in this case. Moreover, in its discretion, this Court also determines that referral of this matter would not be in the best interests of justice or efficiency in light of the questions involved and the amount in controversy. This Court feels amply qualified to render a decision on the matter unaided by a prior ICC determination.

Accordingly, it is the **ORDER** of this Court that Defendant Supreme's motion for referral to the ICC should be, and is hereby **DENIED**.

SIGNED this 13th day of November, 1987.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

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[1] In particular, Supreme relies upon *New Orleans* v. *Southern Scrap Material Co., Ltd.*, 704 F.2d 755 (5th Cir. 1983). In that case, the panel stated that "[t]he primary jurisdiction doctrine requires that issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act be submitted initially to the Commission for determination." *Id* at 758. This Court, however, does not feel that the question of whether Debtor was bound by the alleged agreement involves a policy determination that should first be considered by the ICC.

APPENDIX F

ORDER DENYING DEFENDANT SUPREME BEEF PROCESSORS, INC.'S MOTION TO TRANSFER TO THE INTERSTATE COMMERCE COMMISSION

(United States Bankruptcy Court —
Northern District of Texas — Dallas Division)

(Entered July 11, 1987)

(IN RE: CARAVAN REFRIGERATED CARGO, INC., Debtor. ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, vs. SUPREME BEEF PROCESSORS, INC., Defendant — Bankruptcy Case No. 383-0-1146-M; Adversary No. 385-3755)

Now on this 25th day of June, 1987, came on for consideration Defendant Supreme Beef Processors, Inc.'s Motion To Transfer To The Interstate Commerce Commission and Plaintiff Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.'s Opposition thereto.

Having considered said Motion and brief in supporting thereof, Plaintiff's opposition thereto, and oral argument, the Court finds that a jury has been demanded and that the Interstate Commerce Commission's findings would be advisory only, and would not, in all likelihood, ever reach the jury. Therefore, to defer to the Interstate Commerce Commission would merely delay the resolution of this matter.

The Court further finds that deferral to the Interstate Commerce Commission could delay ultimate resolution of this matter a considerable period of time; this case is the last matter to be wound up in the Caravan estate, which has been pending since August 30, 1983.

Accordingly, it is ORDERED that Defendant's Motion be and is hereby DENIED.

/s/ Judge Robert C. McGuire

APPENDIX G

(A)

CASES REFERRED BY COURT DECISION TO THE INTERSTATE COMMERCE COMMISSION FOR DECISION ON ISSUES OF UNREASONABLENESS OF MOTOR CARRIER PRACTICES INVOLVING MISREPRESENTATION OF RATES (1984 TO PRESENT)

ICC DOCKET NO.	*SHIPPER(S)*
MC-C-10867	Lady Carol Dresses Lady Carol Petites Lorac Originals Rhapsody Blouse
MC-C-10928	Boise Cascade Corp.
MC-C-10961	Primary Steel, Inc.
MC-C-10962	TMBR Drilling
MC-C-10970	Earle Jorgensen
MC-C-10983	Fort Howard Paper
MC-C-10988	Toastmaster, Inc.
MC-C-10989	Cooper Industries
MC-C-10991	Wakefern Food Corp.
MC-C-10995	Anderson, Clayton Co. Anderson Bros.
MC-C-30005	Sovereign Oil Co.
MC-C-30007	Auto Specialties Manufacturing Co. Bendix GAF Markel Commonwealth Glass Products

ICC DOCKET NO.	SHIPPER(S)
MC-C-30013	A. J. Hollander
	A & A International
	Allen Sugar Company
	Banks Lumber Company
MC-C-30013	Becor Western, Inc.
	Border Truck Brokerage
	The Burke Company
	Central Beef Corp.
	Central National Gottesman
	Cleveland Steel
	ConAgra, Inc.
	Dinner Bell Foods, Inc.
	Feuer Leather Corp.
	Forman Distributing Company
	Frank J. Schwab Associates
	Nestle Enterprises
	Furman Lumber, Inc.
	International Minerals
	J & M Sales
	M. Aschheim Company
	Moller Steamship Co. and Maersk Lines Limited
	Marie's Refrigerated Dressings
	Ply-Gem Manufacturing Corp.
	Quemetco, Inc.
MC-C-30013	Quin-T Corporation
	Southern Ohio Beef Inc.
	SKF Industries, Inc.
	Stauffer Chemical Company
	Tarkett, Inc.
	Thypin Steel Company
	Twin City Hide, Inc.
	Wheeling Brake Block

ICC DOCKET NO.	SHIPPER(S)
MC-C-30014	Von Hoffman Press
MC-C-30015	Freeman Products
MC-C-30017	Trailer Marine Transport Corp.
MC-C-30019	Baldor Electric
MC-C-30021	Sewell Plastics
MC-C-30022 and 30023	Artex International Bryan Foods, Inc.
MC-C-30025	Manufacturers Consolidation Service, Inc.
MC-C-30026	Caloric Corporation
MC-C-30027	Sewell Plastics
MC-C-30032	Mitchell Milling
MC-C-30034	Don Fisher Sales
MC-C-30039	Bruard's, Inc.
MC-C-30040	Dennis Klein
MC-C-30041	Spectro Alloys
MC-C-30043	Sipi Metals Corp.
MC-C-30051	Continental Holding Corp.
MC-C-30054	Injected Rubber
MC-C-30055	Commercial Cold Storage, Inc.
MC-C-30056	Otis Elevator
MC-C-30058	Pickwick Internat'l Musicland Group
MC-C-30059	Bunge Edible Oil

ICC DOCKET NO.	SHIPPER(S)
MC-C-30060	Aeroquip Corp.
MC-C-30061	Hiram Walker
MC-C-30062	American Industries
MC-C-30063	W. R. Grace & Co.
MC-C-30064	Conagra Poultry
MC-C-30066	Synthetic Products
MC-C-30069	Yangming Marine Line, et al.
MC-C-30072	E. L. Mustee & Sons
MC-C-30075	Fort Howard Paper
MC-C-30076	Ottawa Strong Sherex Caterpillar
MC-C-30077	Fleming-Potter Morton Metalcraft
MC-C-30077	Baldor Electric
MC-C-30078	Mever Products Div.
MC-C-30079	Johanson Transp.
MC-C-30080	Ampad Corporation
MC-C-30081	Orval Kent Food
MC-C-30082	Marine Lumber Co. Weverhaeuser Co.
MC-C-30083	Rubbermaid
MC-C-30084	Delaware Valley
MC-C-30085	Alex Foods, Inc.

ICC DOCKET NO.	*SHIPPER(S)*
MC-C-30087	Goodmark Foods
MC-C-30088	Royal Oak
MC-C-30089	Anchor Glass Cont.
MC-C-30095	General Mills
MC-C-30096	Star Bronze
MC-C-30105	Ideal Chem. Co.
MC-C-30106	Fisher Mills, Inc.
MC-C-30107	Iron Mountain Ore Co.
MC-C-30110	Stanek Distribution Co.
MC-C-30106	Navistar
MC-C-30120	Zeidel Explorations
MC-C-30122	Georgia Freight Bureau
No. 40059	Zenith Electronics
No. 10942	Atlas Foundry & Machine Company
No. 10951	Liberty Liquors Co.
No. 10953	Anderson Clayton
No. 30000	Zayre Corp.
No. 30008	Ron Miller Assoc.
No. 30010	Kaiser Aluminum & Chemical Corp.
No. 30024	Columbian Rope Co.
No. 30045	Gencorp, Inc.
No. 30046	Product Components, Inc.

ICC DOCKET NO.	SHIPPER(S)
No. 30048	Lucky Stores, Inc.
No. 30071	W. A. Krueger Co.
No. 30074	J. W. S. Delavau Co., et al.
No. 30100	Ottawa Strong & Strong, Inc.
No. 30103	Transpo International, Inc.
No. 30109	KR Newsprint Co., et al.
No. 30112	Georgia Freight Bureau, Inc.
No. 30115	MCI Telecommunications Corp.
No. 30124	The Pillsbury Company
No. 30127	Farrell-Calhoun Paint, Inc.
No. 30130	Sunwise Corp.
No. 30133	Manville Sales Corp.
No. 30134	Thomas J. Lipton, Inc.
No. 30137	B & B Beverage Co.
No. 30139	Ideal Chemical & Supply Company
No. 30140	Sunshine Mills, Inc.
No. 30143	Utica Packing Co., Theodoredis & Sons, Inc.
No. 30148	Falcon Transport, Inc.

(B)

EXAMPLES OF REPORTED COURT DECISIONS REFERRING CASES TO THE INTERSTATE COMMERCE COMMISSION FOR DECISION ON ISSUES OF UNREASONABLENESS OF MOTOR CARRIER PRACTICES INVOLVING MISREPRESENTATION OF RATES

ARKANSAS: *Rebel Motor Freight* v. *Specialty Oil Company*, LR-C-87-565, E.D. AR W.D. 10/14/88 (¶ 83,316)[1]

D.C.: *Maislin Transport* v. *House of Wines*, C.A. No. 84-2831 (D.DC June 2, 1987) (¶ 83,316)

COLORADO: *Delta Traffic Services* v. *Marine Lumber Company*, 483 F.Supp. 734 (D.Colo. 1987)

GEORGIA: *Delta Traffic Services (Oneida)* v. *Knight-Ridder Newspaper Sales, Inc.*, 691 F.Supp. 339 (N.D.Ga 1988)

ILLINOIS: *In re Tobler Transfer Bankr. Christison, Trustee* v. *Caterpiller*, No. 85-00596 74 B.R.373 (Bankr. C.D. IL May 29, 1987)

LOUISIANA: *Rebel Motor Freight, Inc.* v. *Southern Beverage Co., Inc.*, C.A. No. 87-261-B (M.D. LA October 6, 1987); 673 F.Supp. 785 (M.D. LA 1987) (¶ 83,363)

MICHIGAN: *In re: Tucker Freight Lines, Tucker* v. *United Exposition*, (Dist. Ct. affirmed Bankr. Ct. referral to ICC, April 14, 1988), Bky. No. HK 83-2391, Adv. No. 85-0631, 85 Bankr. 426; D.C. W.D. Mich., April 14, 1988 (¶ 83,400)

NEW JERSEY: *Oneida* v. *The Ormond Shops, et al.*, No. 85-03606, Adv. No. 87-0527 et al., Bankr. Ct. NJ, February 17, 1989 (reversing prior denial at ¶ 83,425)

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[1] "¶" references are to MOTOR CARRIER CASES (CCH).

NORTH CAROLINA: *Motor Carrier Audit & Collection Co. (RTC)* v. *Family Dollar Stores*, 670 F. Supp. 644 (W.D. NC 1987)

OKLAHOMA: *In re: Amarex, Inc.*, 74 Bankr. 378 (Bankr. W.D. Okla 1987)

PENNSYLVANIA: *Breman's Express Co.* v. *Don Fisher Sales, Geneo, H. & H., Distrib. Co. Metalchem, Inc., Pryor Corp., Sorce, Inc. & Tile City of PA*, Bankr. W.D.PA, 69 B.R. 356, January 14, 1987 (¶ 83,299), MC-C-30034, April 14, 1988

Breman's Exp. v. *Mitchell Milling, et al.* (Affirming ICC decision, October 13, 1988 ¶ 83,416), 69 B.R. 356 (Bankr. W.D.PA 1987) Bky. No. 84-092, Adv. 86-053, MC-C-30032, October 14, 1987

WISCONSIN: *G. M. W. Inc.* v. *Flambeau Paper Corp.*, No. 85-C-339-S (W.D. WI December 9, 1985) (¶ 83,248)

(C)

COURT DECISIONS ADOPTING INTERSTATE COMMERCE COMMISSION FINDINGS OF UNREASONABLENESS OF MOTOR CARRIER PRACTICES INVOLVING MISREPRESENTATION OF RATES FOLLOWING REFERRAL

Younger Transportation, Inc. v. *TMBR Drilling, Inc.*, No. MO-85-CA-20 (W.D. Tex., September 23, 1987)

Maislin Industries, U.S., Inc. v. *Primary Steel, Inc.*, No. 85-0021 (W.D. Mo., July 22, 1988) (1988 U.S. Dist. LEXIS 10550)

Maislin Industries, U.S., Inc. v. *A. J. Hollander, et al., Adv. No. 85-0076, et al.* (Bktcy, E.D. Mich., December 9, 1988) (41 cases)

Orr v. *ICC*, 703 F. Supp. 676 (W.D. Tenn., 1988)

Delta Traffic Services v. *Marine Lumber Co.*, No. 86-1124-MA (D. Or., January 24, 1989)

Breman's Express v. *Mitchell Milling, et al.* (1989 Fed. Car. Cases ¶ 83,439) (Bktcy. W.D. Pa., 1988)

Orscheln Bros. Truck Lines v. *Toastmaster, Inc.* (1989 Fed. Car. Cases ¶ 83,439) N.D. Ill., 1988)

APPENDIX H

(A)

COURT DECISIONS *DENYING* REFERRAL OF UNREASONABLE PRACTICE ISSUES TO THE INTERSTATE COMMERCE COMMISSION INVOLVING MISREPRESENTATION OF RATES

CALIFORNIA: *West Coast Truck Lines* v. *Kaiser Aluminum & Chemical*, No. C-87-0048 (N.D. CAL July 28, 1987) (¶ 83,336)[1]

Milne Truck Lines & Consolidated/Mark v. *American Licorice Co.*, C-88-1420 DLJ, D.C. N.D. Cal., December 23, 1988

Wescar Freight Systems v. *Conagra, Inc.*, C-88-4664 SAW, D.C.N.D. Calif. January 26, 1989

COLORADO: *Motor Carrier Audit & Collection (Transpo. Int'l)* v. *United Food Service*, CA No. 87-C-298 (D COLO. May 4, 1987) (1987 U.S. Dist. LEXIS 13659) ¶ 83,326

CONNECTICUT: *Oneida Motor Freight Inc., Debtor and Delta Traffic Service, Inc.* v. *Georgia Pacific Corp.*, — B-87-482 (D CT. December 2, 1987) (¶ 83,393) 684 F.Supp. 769

Delta Traffic Services (Oneida MF) v. *Cuisinarts, Inc.*, CA-H-87-424 (AHN) (D.Conn. October 28, 1987)

Delta Traffic Services and Campbell 66 Express v. *Purdue Frederick Co.*, Civ. No. B-88-196 (W.W.E.), D. Conn., March 8, 1989

GEORGIA: *Feldspar Trucking Company* v. *Greater Atlanta Shippers Assn.*, No. C-87-575A, (ND GA Atl. Div. September 29, 1987), 683 F.Supp. 1375 (1987 Aff'd, 11th C.A. July 20, 1988) (¶ 83,397)

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[1] "¶" references are to MOTOR CARRIER CASES (CCH).

ILLINOIS: *Motor Carrier Audit & Collection* v. *Casio,* CA No. 6124 (N.D. IL October 27, 1987)

Motor Carrier Audit Collection v. *Medline Ind.*, CA No. 6123 (N.D. IL November 2, 1987)

Motor Carrier Audit Collection v. *Portion Packaging, Inc.*, CA No. 87-C-6108 (N.D. Ill. April 22, 1988)

Motor Carrier Audit Collection v. *C&D Charter Power Sys.*, No. 88-C-3161 (N.D. Ill. October 27, 1988)

Transpo. Int'l. v. *Bunge Edible Oil Corporation,* No. 86-C-9330 (N.D. Ill. May 11, 1987, aff'd. 87-1907, 7th Cir. July 27, 1987)

MICHIGAN: *IMFS, Inc.* v. *Nekoosa Papers, Inc.*, No. G86-355 (W.D. Mich., August 28, 1986)

MISSOURI: *Campbell 66* v. *Transcrit Corp.*, 86-01697-S-1-11, 88-205-S-1-11, June 1, 1988

MINNESOTA: *Total Transportation, Inc.* v. *Armour & Co.*, Bky 4-85-1909, Adv. 4-87-233, (D. Minn., 4th Div.), March 18, 1988 84 Bankr. 5909 (¶ 83,369)

v. *Portion Packaging, Inc.*, C.A. No. 6108, N.D. IL, E. Div. April 22, 1988

v. *BTS Transport. Services,* Adv. 4-87-269 (April 8, 1988) (¶ 83,370)

v. *Land O'Lakes, Inc.*, Adv. 4-87-227, Bky. Ct. Minn., August 23, 1988 (¶ 83,403)

v. *Assoc. Milk Producers,* Adv. 4-87-215 + 276, B.C.D.Minn. May 11, 1988 (¶ 83,373)

Indianhead Truck Lines v. *Miles Home Div. of Insileo,* Bky 4-84-2291, Adv. No. 4-86-325, B.C. Minn., September 15, 1987 (¶ 83,372)

MISSISSIPPI: *Delta and Dudley Trucking Company* v. *Armstrong World Industries,* CA No. J88-0099, S.D. Miss., Jackson Div., November 4, 1988

NEW JERSEY: *Oneida Motor Freight Inc., Debtor and Delta Traffic Service, Inc.* v. *Felsway Corp.*, Adv. No. 87-0513

v. *C&A Wallcoverings* — 87-0661

v. *The Ormond Shops* — 87-0627

(Bankr. NJ October 19, 1987) (¶ 83,346)

Oneida Motor Freight Inc., Debtor and Delta Traffic Service, Inc. v. *Ormond Shops*, Adv. No. 87-0527

v. *Thomas J. Lipton*, Adv. No. 87-0642

v. *Lionel Leisure*, Adv. No. 87-0664

v. *C&A Wallcovering*, Adv. No. 87-0661

(Bankr. Ct., D.NJ September 29, 1988) (¶ 83,425); Reversed on reconsideration and referred to ICC, February 17, 1989

NEW YORK: *Delta Traffic Service & Oneida MF* v. *Appco Paper & Plastics Corp.*, CV-87-2325, E.D.N.Y., November 2, 1988 (1988 U.S. Dist. LEXIS 13306) (¶ 83,426) (Appeal Pending, 2nd Cir. Docket No. 88-9057)

Delta Traffic Service (Oneida) v. *Coffee Holding Co.*, 87 CV2011, E.D. N.Y., June 3, 1988 (¶ 83,394)

NORTH CAROLINA: *In re: Carolina Motor Express Inc., Langdon M. Cooper, Trustee and Mark and Assoc. of NC* v. *California Consolidated Ent.* — Adv. No. 86-0498 (Bankr. W.D.N.C. March 25, 1987) 78 BR.773

McLean Trucking Co. v. *Allied Business Forms*, C-B-86-023, Adv. 88-042, (Bankr. W.D. N.C., Charlotte Div.), April 28, 1988 (¶ 83,378)

Observer Transp. v. *Service Merchandise*, No. C-C-87-196-P, D.C. W.D. NC, Charlotte Div., May 16, 1988 (¶ 83,418)

OHIO: *Delta Traffic Service, Inc. (Oneida Motor Freight)* v. *E. L. Mustee & Sons*, N.C. Ohio, E. Div., CA No. C87-1737, May 12, 1988

Delta Traffic Service (Campbell 66) v. *Sun Chemical Dispersions Div.*, C-1-88-409, September 14, 1988, D.C.S.D. Ohio, W.Div. (¶ 83,415)

Delta Traffic Service (Oneida) v. *The Lincoln Electric Co.*, C-87-1744, N.D. OH, June 15, 1988

OREGON: *Silver Wheel Freight Line* v. *AT&T Tech.* — Bankr. No. 382-03558-S7, Adv. No. 85-0743-S (D. OR October 23, 1986)

PENNSYLVANIA: *Oneida Motor Freight, Inc., Debtor and Delta Traffic Service, Inc.* v. *Occidental Chem.*, No. 85-03606, — Adv. No. 87-4217 (E.D. PA, August 18, 1987) (¶ 83,381)

v. *Keystone Lighting* — 87-3659 (E.D. PA, September 23, 1987)

v. *Pride Health Care* — 87-0915 (M.D. PA, November 18, 1987)

In re Taynton Freight Systems v. *Tripar Transp.*, No. 5-87-0080 (M.D. PA August 14, 1987)

Halls Motor Lines v. *I.B.M.*, CA 88-0717, February 22, 1989

TENNESSEE: *Delta (Campbell 66)* v. *Madison Mills*, No. 3-88-0315, December 22, 1988

TEXAS: *Robert Yaquinto Jr., Trustee for Caravan Refrigerated Cargo, Inc.* v. *Supreme Beef Processors, Inc.*, CA 3-87-2274-R (D.ND. TX Dallas Div. January 30, 1988)

Delta Traffic Service (One-Way Cartage System) v. *Texas Cartage Terminal Warehouse*, N.D. TX, Dallas Div. CA 3-86-2904-D, June 2, 1988 (¶ 83,384)

UTAH: *Delta Traffic Service* v. *Sysco Intermountain Food Service*, CA No. 87-C-0345 (C. D. Utah October 30, 1987) (After Trial on the Merits, Ct. dismissed the complaint, March 27-30, 1989, Written Opinion to follow)

WISCONSIN: *G.M.W. Inc.* v. *Certified Parts Corp.*, No. 86-1086 (D. WI December 18, 1986) 135 Wis. 2d 503, 400 NW 2d 512 (C.T. App. 1986)

(B)

COURT DECISIONS REJECTING ICC FINDINGS OF UNREASONABLE PRACTICES INVOLVING CARRIER MISREPRESENTATION AS NON-BINDING

INF, Ltd. v. *Spectro Alloys Corp.*, 690 F. Supp. 808 (D. Minn., 1988)

Delta Traffic Service, Inc. v. *Synthetic Products Co.*, (1988 Fed. Car. Cases ¶ 83,408) (N.D. Ohio, 1988)

Pongetti v. *Baldor Electric Co., et al.* (1988 Fed. Car. Cases ¶ 83,399) (Bktcy, N.D. Miss., 1988) (3 cases)

Motor Carrier Audit & Collection Co. v. *Baldor Electric Co.*, No. CA3-85-2002R (N.D. Tex., July 27, 1988)

Orscheln Bros. Truck Lines v. *Zenith Electric Corporation* (1989 Fed. Car. Cases ¶ 83,428) (N.D. Ill., 1988)